M NITHYANANTHAN

v.

SOONG BA CHEEK

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: P-02-419-95]
3 APRIL 1998

CONTRACT: *Specific Performance - Sale and purchase of land - Whether specific performance could be granted - Whether sale and purchase agreement a proper one to be enforced*

CONTRACT: *Specific performance - Specific Relief Act 1950, s. 19 - Whether applicable - Whether plaintiff had an option not to transfer - Whether payment of stipulated amount replaced act of transfer*

CONTRACT: *Specific performance - Whether precluded by provision for damages - Whether payment of damages an alternative to performance of contract - Significance of amount of damages stipulated in contract*

This was an appeal against the High Court judgment which dismissed the appellant's claim for specific performance. The appellant had entered into a sale and purchase agreement ('SPA') with the respondent for the purchase of the respondent's land together with a building erected thereon, described as Lot 53, Bandar Balik Pulau, Daerah Barat Daya ('Lot 53'). The appellant had paid a deposit of RM500 and the balance of the purchase price of RM17,000 was to be settled as soon as the government housing loan was disbursed. Clause 2(b)(i) and (ii) of the SPA stated that upon settlement of the purchase price, the transfer of title to the appellant would be effected. Clause 3 of the SPA provided that in the event of a breach by the appellant, he would lose his deposit and if the breach was by the respondent, a sum of two times the deposit would have to be paid to the appellant. Subsequently, the respondent through his lawyers informed the appellant upon the appellant's depositing the balance of the purchase price with his solicitors, that he did not wish to sell Lot 53. A sum of RM1,000 was sent conforming with cl 3 of the SPA. The appellant entered a caveat on the land and brought an action against the respondent for specific performance. The High Court rejected the appellant's application on the ground that cl 3 of the SPA gave the respondent an option of paying the stipulated amount of damages to the appellant. It was thus

necessary for the court to construe cl 3 in terms of the SPA and decide: (i) whether the provision in cl 3 of the SPA constituted an alternative to the act of transfer in cl 2(b)(ii); (ii) whether s. 19 of the Specific Relief Act 1950 ('Act 137') was applicable; and (iii) whether the SPA was one proper to be specifically enforced and might be so enforced.

Held:

Per Denis Ong JCA

[1] Clause 2(a) of the SPA fixed the purchase price of Lot 53 and stipulated the mode of payment to be by way of a deposit without a transfer of possession. Clause 2(b)(i) of the SPA stipulated a deposit and the balance to be settled once the loan from the government was released. By cl 2(b)(ii) of the SPA, the obligation was on the appellant to comply with the terms of payment within 12 months and the obligation on the respondent was to transfer the title upon the compliance therewith. Those terms would therefore constitute a contract complete in itself and the respondent was bound to transfer Lot 53 upon tender by way of performance by the appellant of the full purchase price. The respondent's obligation to transfer was absolute, which meant that there was no alternative to performance by the act of transfer. If transfer was not effected, there would be non-performance.

[2] Since it would take the appellant the whole purchase price to have the respondent perform the transfer of Lot 53, and if the purpose of stipulating an aggregate sum and its payment in cl 3 of the SPA was to give the respondent an alternative to such transfer, so that the respondent had an option or a choice to transfer or to pay, then the figure for the aggregate sum should properly be in the region of the purchase price and its payment should be stipulated as being an alternative to the performance of the transfer and not as damages for its non-performance.

[3] The sum of RM1,000 was too low to be a suitable alternative to the transfer, and in terms of the agreement, the money provision was not an alternative to the performance by the respondent of the transfer which he was bound to do under cl 2(b)(ii). The true purpose of stipulating the aggregate sum and its payment was solely as liquidated damages payable by the respondent in the event of his non-performance or breach. Accordingly, the respondent was bound to transfer Lot 53.

[4] The existence of the money provision in cl 3 of the SPA would not prevent the court from ordering specific performance under s. 19 of Act 137. Hardship is a defence to a decree of specific performance and it should be pleaded. In the present case, there was no plea in the respondent's defence of any hardship nor was there evidence to rebut the presumption in s. 11(2) of Act 137. Accordingly, the agreement was a proper one to specifically enforced.

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini merupakan satu rayuan terhadap penghakiman Mahkamah Tinggi yang telah menolak tuntutan perayu untuk perlaksanaan spesifik. Perayu telah memasuki satu perjanjian jualbeli ('SPA') dengan responden untuk pembelian tanah responden bersama-sama dengan sebuah bangunan di atasnya, yang disebut sebagai Lot 53, Bandar Balik Pulau, Daerah Barat Daya ('Lot 53'). Perayu telah membayar deposit bernilai RM500 dan baki harga belian sebanyak RM17,000 hendaklah dijelaskan sebaik sahaja pinjaman perumahan kerajaan dibayar keluar. Fasal 2(b)(1) dan (ii) SPA tersebut menyatakan bahawa setelah penyelesaian harga belian, pemindahan hakmilik kepada perayu akan dikuatkuasakan. Fasal 3 SPA tersebut memperuntukan bahawa sekiranya berlaku satu kemungkiran oleh perayu, beliau akan hilang depositnya dan jika kemungkiran dilakukan oleh responden, satu jumlah yang dua kali ganda daripada jumlah deposit tersebut akan dibayar oleh responden. Responden melalui peguam-peguamnya telah memaklumkan perayu setelah perayu mendepositkan baki harga belian dengan peguamcaranya, bahawa beliau tidak ingin menjual Lot 53. Satu jumlah sebanyak RM1,000 telah dikirimkan dengan mematuhi fasal 3 SPA tersebut. Perayu telah memasukkan kaveat ke atas tanah tersebut dan memulakan satu tindakan terhadap responden untuk pelaksanaan spesifik. Mahkamah Tinggi telah menolak permohonan perayu atas alasan bahawa fasal 3 SPA telah memberikan responden pilihan membayar jumlah gantirugi yang ditetapkan kepada perayu. Ianya adalah dengan itu perlu bagi mahkamah untuk mentafsirkan fasal 3 menurut SPA tersebut dan memutuskan: (i) samada peruntukan dalam fasal 3 SPA tersebut membentuk satu alternatif kepada perbuatan memindahmilik dalam fasal 2(b)(ii); (ii) samada Akta Relief Spesifik 1950 ('Akta 137') terpakai; dan (iii) samada SPA tersebut merupakan satu perjanjian yang wajar untuk secara khususnya dikuatkuasakan.

Diputuskan:
Oleh Denis Ong HMR

[1] Fasal 2(a) SPA menetapkan harga belian Lot 53 dan menentukan cara pembayaran hendaklah dibuat melalui satu deposit tanpa pemindahan pemilikan. Fasal 2(b)(i) SPA tersebut menentukan satu deposit dan baki hendaklah dijelaskan sebaik sahaja pinjaman daripada kerajaan dikeluarkan. Melalui fasal 2(b)(ii) SPA tersebut, kewajipan terletak pada perayu untuk mematuhi terma-terma pembayaran dalam tempoh masa 12 bulan dan kewajipan terletak pada responden untuk memindahkan hakmilik setelah pematuhannya. Terma-terma itu dengan itu akan membentuk satu kontrak yang dengan sendirinya lengkap dan responden adalah terikat untuk memindahkan Lot 53 setelah tender melalui pelaksanaan oleh perayu akan harga belian sepenuhnya. Kewajipan responden untuk memindahmilik adalah mutlak, yang bermaksud bahawa tidak terdapat sebarang alternatif kepada perlaksanaan melalui perbuatan pindahan hakmilik. Sekiranya pemindahan tidak dikuatkuasakan, akan terdapat ketidak-laksanaan.

[2] Oleh kerana adalah perlu bagi perayu untuk menjelaskan keseluruhan harga belian agar responden dapat melaksanakan pemindahan Lot 53 tersebut; dan jika tujuan menetapkan satu jumlah agregat dan pembayarannya dalam fasal 3 SPA tersebut adalah untuk memberikan responden satu alternatif kepada pemindahan yang sedemikian, supaya responden mempunyai satu pilihan atau satu opsyen untuk memindahmilik atau untuk membuat pembayaran; maka angka bagi jumlah agregat itu haruslah dengan wajarnya dalam lingkungan harga belian dan pembayarannya seharusnya ditetapkan sebagai merupakan satu alternatif kepada perlaksanaan pindahmilik tersebut dan bukannya sebagai gantirugi bagi ketidak-laksanaannya.

[3] Ianya merupakan penegasaan mahkamah bahawa angka RM1,000 adalah terlalu rendah dan tidak munasabah untuk satu menjadi alternatif yang sesuai kepada pindahmilik tersebut, dan menurut terma-terma perjanjian tersebut, peruntukan wang tersebut bukannya merupakan satu alternatrif kepada pelaksanaan oleh responden akan pindahmilik tersebut yang mana beliau adalah terikat untuk lakukan di bawah fasal 2(b)(ii). Tujuan sebenar penetapan jumlah agregat tersebut dan pembayarannya adalah semata-mata sebagai gantirugi jumlah tertentu yang kena dibayar oleh responden sekiranya berlaku ketidak-laksanaan atau kemungkiran oleh beliau. Berikutan itu, responden adalah terikat untuk memindahmilik Lot 53.

[4] Kewujupan peruntukan wang dalam fasal 3 SPA tidak akan menghalang mahkamah daripada memerintahkan perlaksanaan sepesifik di bawah s. 19 Akta 137 tersebut. Kesusahan merupakan satu pembelaan kepada satu dekri perlaksanaan spesifik dan ianya haruslah diplidkan. Dalam kes semasa, tidak terdapat sebarang rayuan dalam pembelaan responden mengenai sebarang kesusahan mahupun terdapatnya keterangan yang mematahkan tanggapan dalam s. 11(2) Akta 137 tersebut. Sehubungan itu mahkamah telah memutuskan bahawa perjanjian tersebut merupakan suatu perjanjian yang wajar untuk dikuatkuasakan secara khususnya.

[Rayuan dibenarkan dengan kos.]

Cases referred to:
Hassan v. Ismail [1970] 1 MLJ 200 ***(refd)***
Tan Suan Sim v. Chong Fook Shen [1980] 2 MLJ 66 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 75
Specific Relief Act 1950, ss. 19, 12, 11(1)(c), (2)

Other sources referred to:
Halsbury's Laws of England, 4th edn (reissue), vol 44(1), paras 815 & 817
Principles of Equitable Remedies, ICF Spry, 4th edn, p 73
Vendor and Purchaser, Williams, 4th edn, vol 2, p 1048

For the appellant - SP Annamalai; M/s Annamalai & Co
For the respondent - Ch'ng Theam Inn; M/s Ch'ng Theam Inn & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 203 of 1979]

Reported by Michele Saw

JUDGMENT

Denis Ong JCA:

This is an appeal by the plaintiff (appellant) against the judgment dated 18 April 1995 of the Penang High Court dismissing the plaintiff's claim by original action for, amongst others, specific performance of a contract in writing dated 3 December 1977 for the sale of the defendant's (respondent) land together with the building thereon described as Lot No. 53 Bandar Balik Pulau, Daerah Barat Daya, Pulau Pinang, (hereafter referred to simply as Lot 53) to the appellant. The judgment further ordered a sum of RM1,100 to be paid to the appellant out of the court deposit and an assessment by the senior assistant registrar of expenses incurred by the appellant in obtaining a government housing loan.

We heard this appeal on 27 January 1997 and on the same day made known our decision orally that we allowed the appeal with costs here and below and ordered that the balance of the purchase price be paid by the appellant's solicitors to the respondent's solicitor and thereupon the respondent do execute a transfer in favour of the appellant, in default whereof the senior assistant registrar of the Penang High Court be empowered to execute such transfer. We also directed that the parties be at liberty to apply.

Here are the facts of the case. By an agreement dated 3 December 1977 written in the Malay Language, the respondent (therein described as the first party) agreed to sell and the appellant (therein described as the second party) agreed to purchase from the respondent Lot 53 for the price of RM17,500; RM500 to be paid by the appellant as deposit and the balance of RM17,000 to be settled as soon as the government housing loan was disbursed. It was a term of the agreement that transfer of title to the appellant of Lot 53 shall be effected by the respondent upon settlement of the purchase price within a period of twelve months.

Pursuant to the agreement, the appellant paid to the respondent a sum of RM500 as deposit and part payment of the purchase price, leaving a balance of RM17,000. On his application, the housing loan division of the Federal Treasury, by letter dated 18 October 1978, approved a loan of RM11,530 of which RM11,000 was appropriated for the land and house and the balance for incidental expenses. On 7 November 1978, the loan of RM11,000 was disbursed to M/s. Kumar, Chan & Chia acting for the appellant and they informed the respondent accordingly by letter dated 20 November 1978 with a request for the certificate of title to Lot 53 in return for the release of the said sum to him. On 24 November 1978, M/s. Kumar, Chan & Chia wrote by registered post to Mr. Ch'ng Thiam Inn seeking confirmation from him that he was indeed the respondent's solicitor in the sale transaction and if so, they would forward to him by return post a sum of RM17,000 being the balance of the purchase price. On the same date ie, 24 November 1978. M/s. Ch'ng Theam Inn & Co replied to M/s. Kumar, Chan & Chia's letter dated 20 November 1978 confirming that he was acting for the respondent and informing that the respondent did not wish to sell Lot 53 to the appellant and enclosing a cheque for RM1000 in favour of the appellant being twice the amount of deposit payable to the appellant under cl. 3 of the agreement in the event that the respondent did not want to complete the sale. The reply further sought the amount of actual expenses incurred by the appellant for which the respondent was willing to pay. On 25 November 1978 a private caveat was entered against Lot 53 on the application of the appellant. By letter dated 27 November 1978, the respondent's solicitor replied to the appellant's solicitors' letter dated 24 November 1978 reiterating that the respondent no

longer wished to sell Lot 53 to the appellant and that he had on 24 November 1978 despatched to their office the respondent's cheque for RM1,000 together with a covering letter of the same date. By letter dated 27 November 1978, the appellant's solicitors returned the cheque for RM1,000 to the respondent's solicitor and informed him that they had caveated Lot 53 and would bring an action for specific performance of the agreement. To this, the respondent's solicitor responded by letter dated 30 November 1978 protesting against the caveat entered and urging its withdrawal. Once again it forwarded the cheque and at the same time justified the respondent's change of mind and the refund by reference to express provision of the agreement without specifying it. There was no response from M/s. Kumar, Chan & Chia until 6 April 1979 when M/s. Allen & Gledhill wrote to the respondent's solicitor to inform him that they had taken over from M/s. Kumar, Chan & Chia as the appellant's new solicitors. In that letter the appellant's solicitors referred to the respondent's solicitor's letters dated 24 and 27 November 1978 and to cl. 3 of the agreement. They maintained that the agreement was valid and existing and in no way rescinded by the respondent taking advantage of his own default and choosing to refund the deposit and other incidental expenses. It concluded by asking the respondent's solicitor if he had authority to accept service of process as they were instructed to commence proceeding for specific performance of the agreement.

By para. 2 of his letter dated 9 April 1979, the respondent's solicitor replied that under the agreement both sides were at liberty to change their minds about selling or buying Lot 53 subject to compensation payable by the party refusing to sell or to buy as the case might be. It also recounted the brief history of the cheque, threatened to ask for damages for wrongful caveat if the caveat was not removed timely and confirmed that he had authority to accept service. The cheque in question was in fact returned to the respondent's solicitor pending settlement under cover of a letter dated 11 April 1979 from the appellant's solicitors. This was followed by another letter dated 13 April 1979 headed "without prejudice" to the respondent's solicitor in which the appellant's solicitors, reaffirmed that there was a valid and binding contract for the sale and purchase of Lot 53 and denied para. 2 of the letter of the respondent's solicitor. On 8 June 1979, the appellant commenced action for specific performance of the agreement; alternatively or in addition thereto, damages for breach. On 3 September 1979, the respondent defended and counterclaimed for damages for wrongful caveat. The action was tried in which both the appellant and the respondent gave oral evidence on 3 April 1995 and on 18 April 1995 the court below gave its judgment and made certain orders on the original action which we mentioned before but made no order on the counterclaim.

It is common ground that the appellant is a tenant of the respondent and is in actual occupation of the premises of Lot 53 at all material times. It is a fact established on the undisputed oral and documentary evidence of the appellant that as at 24 November 1978, before the expiry of the twelve months period stipulated in the agreement, the appellant had sufficient funds deposited with his solicitors to pay the balance of the purchase price outstanding at RM17,000 (ie, RM11,000 from the Government housing loan and RM6,000 from his own savings). Paragraph 3 of the appellant's solicitors' letter dated 24 November 1978 to the respondent's solicitor left no doubt whatever that the appellant is indeed ready and willing to tender through his solicitors the RM17,000 in fulfillment of his obligation as purchaser under the agreement. It is a fact admitted by the respondent in his defence that he was in breach of the agreement.

The relevant issues raised by the pleadings, the facts and the submissions of both learned counsel in the court below were three fold:

(i) whether or not the effect of clause 3 in the agreement was to give the respondent an option or a choice of either transferring Lot 53 or paying the stipulated amount of damages to the appellant instead;

(ii) whether s. 19 of the Specific Relief Act 1950 (Act 137) applied to the facts of the present case; and

(iii) whether the agreement was one proper to be specifically enforced and may be so enforced.

The court below dealt with these issues in its grounds of judgment and, at p. 19 of the Appeal Record, held on issue (i) that by virtue of the peculiar wording of cl. 3, the respondent had that option or choice despite cl. 2(b)(i) of the agreement and expressly found as a fact that the respondent retained such option or choice throughout the operation of the contract. It held further that under cl. 3, the appellant also had an option or choice. On issue (ii) it made no finding one way or the other. It did not entirely rule out the relevancy of s. 19 to the facts of the present case but added that it was in the sole discretion of the court to decide the relief to be granted and that discretion was to be exercised upon equitable principles. On issue (iii), it held that the agreement was not one proper to be specifically enforced chiefly because specific performance was not envisaged in the agreement and neither was it stated that the appellant was entitled to such relief.

We are in agreement with the court below that the effect of cl. 3 in the agreement is a matter of construction. But first, the meaning of cl. 3. It states thus:

> 3. Kemungkiran: sebarang kemungkiran berlaku dan kiranya datang dari pihak pertama maka mestilah ianya membayar ganda wang cengkeram yang diterima dan lain-lain perbelanjaan yang dibelanjakan oleh pihak kedua berkaitan dengan perkara ini. Jika kemungkiran itu datang dari pihak kedua, maka semua wangnya kelak hilang percuma.

We also agree with the court below that "kemungkiran" means "breach" in English. Translated into English, cl. 3 reads thus:

> 3. Breach: Any breach committed and if it is by the first party then he must pay twice the sum of money received as deposit plus other expenses incurred by the second party in connection with this matter. If that breach is by the second party then his entire deposit sum is forthwith forfeited.

We observe here that cl. 3 speaks of a breach of the agreement and makes provision in the event of a breach by either the second party or the first party. In the case of the second party, it stipulates immediate forfeiture of his deposit and in the case of the first party it stipulates payment by the second party of twice the deposit sum plus incidental expenses actually incurred by the second party. As we see it, cl. 3 accords with s. 75 of the Contracts Act 1950 (Act 136) and by the very nature of its stipulation brings the agreement for a simple sale of land within the context of s. 19 of Act 137, and more so, in the light of the respondent's admission of fact that he is the party in default and is willing to pay. Thus on issue (ii) we hold that s. 19 is relevant and applies to the agreement, the facts and the issues contended for the respondent.

The question then is whether the agreement is one that is proper to be specifically enforced and may it be so enforced as in issue (iii). In this context issue (i) becomes relevant because if the effect of cl. 3 in the agreement was to give the first party an option or a choice of either to transfer Lot 53 or to pay the stipulated amount to the second party instead, as the respondent contended, then specific performance of the agreement may not be appropriate. On the other hand if on a true construction of cl. 3 in terms of the agreement, there is no such option or choice given to the first party that is to say, he is bound to perform the act of transfer of Lot 53, then specific performance is available to the second party and may appropriately be enforced against the first party: see I.C.F. Spry – the *Principles of Equitable Remedies* 4th Edn. p. 73; *Halsbury's Laws of England* 4th Edn. (reissue) Vol. 44(1) paras 815 and 817; and also the dissenting judgment of Ali Hassan FJ in *Hassan v. Ismail* [1970] 1 MLJ 200 (FC) at p. 212.

It is clear from the text references and *Hassan's* case *(supra)* that cl. 3 in terms of the agreement is capable of two constructions namely, (i) that the first party has an option or a choice of either transferring Lot 53 or paying to the second party the aggregate amount stipulated; and (ii) that the first party

is bound to transfer Lot 53, (that is to say no option or choice). It is necessary for the court below to construe cl. 3 in terms of the agreement and come to a conclusion as to which of the two is the true construction and to make a definite finding of fact based on the true construction.

As we understand the agreement, cl. 2(a) fixes the purchase price of Lot 53 at RM17,500 and stipulates the mode of payment to be by way of a deposit without a transfer of possession. Clause 2(b)(i) stipulates a deposit of RM500 and the balance of RM17,000 to be settled once the loan from the Government is released. By cl. 2(b)(ii) the obligation is on the second party to comply with the terms of payment in cl. 2(b)(i) within twelve months and the obligation is on the first party to transfer the title to Lot 53 upon compliance therewith. It is plain to us that in themselves, those terms would constitute a contract complete in itself and the first party is bound to transfer Lot 53 upon tender, by way of performance by the second party, of the full purchase price. It is also clear to us that his obligation to transfer is absolute. In other words, there is no alternative to performance by the act of transfer. Shortly stated, the first party has no option or choice but to transfer. If the transfer is not effectuated, there is non-performance ie, a breach by the first party. If for instance, there are no express provisions like those in cl. 3 or for specific performance and the first party is unwilling to transfer Lot 53 although the second party has fulfilled the terms of payment in cl. 2(b)(i) the question is may specific performance be ordered against the first party in those circumstances. Based on the Federal Court decision in *Tan Suan Sim v. Chong Fook Shen* [1980] 2 MLJ 66, it is clear to us that the answer would be in the affirmative.

The issue which follows is issue (i) namely, what is the effect of cl. 3 in terms of the agreement. As we observed earlier, cl. 3 speaks of a breach. That in our view, merely reaffirms the position in law that non-performance of the obligations in the agreement is a breach and in no sense an alternative to performance and hence an option or a choice open to the first party as learned counsel for the respondent contended in the court below. With respect, that is not the legal issue here. In relation to the respondent, the legal issue crops up because of a money provision in cl. 3 which stipulates an aggregate sum to be paid by the first party to the second party in the event of a breach by the former. It is whether or not that particular provision in cl. 3 constitute an alternative to the act of transfer in cl. 2(b)(ii). That is the matter for construction. If it does, the first party can validly say that he has an option or a choice to elect either to perform the act of transfer or else to pay the aggregate sum stipulated instead. In that event specific performance is not available to order him to transfer Lot 53 if he elects to pay the aggregate

sum instead. If it does not, then he has no alternative but to perform the act of transfer in discharge of his obligation in cl. 2(b)(ii). In that event specific performance is available to order him to transfer Lot 53.

On the matter of construction, it is relevant to ask here what is the purpose of stipulating the aggregate sum and its payment which purpose is not stated in cl. 3. It is noteworthy that that stipulation finds its counterpart in the stipulation of a deposit and its forfeiture in the case of the second party. The amount agreed for the deposit is RM500. That same amount also serves as an initial down payment towards the full purchase price leaving a balance outstanding at RM17,000. As a deposit its sole purpose is to secure full payment of the purchase price due upon the expiration of the twelve-month period. If he performs his obligation by payment in time of the balance due there is no question of forfeiture of his deposit. Forfeiture arises only if there is non-performance on the part of the second party ie, he does not pay the balance after the Government has released the loan so that he is in breach of his obligation. In the case of the first party, the aggregate sum agreed consists of twice the sum of deposit plus incidental expenses. That gives a figure of RM1,000 plus incidental expenses to be verified. Substantially, the first party pays only RM500 out of his own pocket, the balance of RM500 plus the expenses are in truth and in fact refunds to the second party. If he performs the transfer of Lot 53, there is no question of payment of the aggregate sum. Payment only arises if there is non-performance ie, a breach on the part of the first party.

It is plain and obvious to us that if it takes the second party RM17,500 to move the first party to perform the transfer of Lot 53 and if the purpose of stipulating an aggregate sum and its payment in cl. 3 is to give the first party an alternative to such transfer so that he has an option or a choice to transfer or to pay, then the figure for the aggregate sum should properly be in the region of the purchase price and its payment stipulated as an alternative to the performance of the transfer and not damages for its non-performance: see Williams on *Vendor and Purchaser* 4th Edn. Vol. 2 at p. 1048. In the present case, the actual figure for the aggregate sum, as we have mentioned, works out to be RM500. That figure is in our view unreasonably low as a suitable alternative to the transfer. Further, payment thereof was stipulated to be in the event of a breach.

Thus from a consideration of cl. 3 in terms of the agreement, the true construction, in our view, is that the money provision (ie, the aggregate sum) in cl. 3 is not an alternative to the performance by the first party of the transfer which he is bound to do under cl. 2(b)(ii). Accordingly, on issue (i) we hold that the respondent who is the first party has no such option or choice and is

bound to transfer Lot 53. In our view also, the true purpose of stipulating the aggregate sum and its payment is solely as liquidated damage payable by the first party in the event of his non-performance or breach and we also hold accordingly. We are of the same view as the court below in concluding that the aggregate sum is liquidated damage but we differ from its conclusion that such liquidated damage is an alternative to performance of the transfer and thus the respondent (the first party) has an option or choice which he retained throughout the operation of the contract. To that extent for the reasons given and with respect, the court below has erred.

In the light of our holding on issue (i), the existence of the money provision in cl. 3 does not prevent the court from ordering specific performance under s. 19 of Act 137: see the dissenting judgment of Ali Hassan FJ in *Hassan's* case *(supra)*; *Spry (ibid)* at p. 74; *Halsbury (ibid)* at para 815; and also *Williams (ibid)* at p. 1048.

Before us learned counsel for the appellant submitted that the appellant had duly complied with his obligations under the agreement. The appellant is a tenant in occupation of the house and the RM17,000 which is the balance of the purchase price is at all times deposited with his solicitors. He is ready and willing at all times to perform his obligations. There is no restriction on the title to Lot 53 and there is nothing in the conduct of the appellant to disentitle him to specific performance. He submitted that ss. 19, 12, 11(2), 11(1)(c) illustration (a) of Act 137 applied and the court below erred in disregarding them. Learned counsel for the respondent submitted that specific performance is an equitable relief and that the judgment of the court below is thorough.

We agreed with learned counsel for the appellant that ss. 19, 11(2) and 11(1)(c) illustration (a) applied to the present case. We have dealt with s. 19 at length and it is a fact that the housing loan has been disbursed before 3 December 1978 and there is no restriction on the title to Lot 53. It is no part of the case of the respondent that he is unable or unwilling to perform the transfer. The main prop of the defence of the respondent is that specific performance is not available because he has an option or a choice and by virtue of that option he is entitled to elect, which he has done so, when on 24 November 1978 he changed his mind to pay instead of to transfer. He admitted in cross examination at p. 46 of the Appeal Record that the reason for changing his mind was because his wife did not want him to sell Lot 53. We have held that he has no such option; and in any case, his wife's willingness or otherwise to the transfer is irrelevant. Hardship is a defence to a decree of specific performance and should be pleaded. There is no such plea in his defence and

there is no evidence of hardship or to rebut the presumption in s. 11(2). Thus on issue (iii) we hold that the agreement is one proper to be specifically enforced and may be so enforced.

For these reasons stated, we were satisfied that the court below was mistaken in its application of equitable principles and consequently erred in declining or refusing to order specific performance of the agreement. We therefore decided that this appeal be allowed and made those orders on 27 January 1997 which we stated before.

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